

## Challenging Sexual Preference Discrimination in Private Employment

The legal rights of gay<sup>1</sup> people have received increased protection in recent years, but progress has been painfully slow. Homosexual conduct may still be grounds for extensive persecution.<sup>2</sup> Employment discrimination against gay people is still pervasive. Discrimination against gay people in public employment has been curtailed somewhat,<sup>3</sup> although if a gay person "flaunts" his or her homosexuality,<sup>4</sup> is employed as a teacher,<sup>5</sup> or serves as a member of the military,<sup>6</sup> dismissal may still be approved by the courts. Contrary to the limited gains that have been made in the context of public employment, discrimination against gay people in private employment<sup>7</sup> has been subjected to minimal examination and limited regulation.

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1. The term "gay" is synonymous with homosexual and the two terms will be used interchangeably in this Comment. "Homosexuality" has been defined as "1: atypical sexuality characterized by manifestation of sexual desire toward a member of one's own sex 2: erotic activity with a member of one's own sex. . . ." A "homosexual" is defined as "one who is inclined toward or practices homosexuality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1085 (1966). It is difficult to draw a clear line between those persons who could be labeled homosexual and those who could be labeled heterosexual. Courts have attached the "homosexual" label to persons with widely varying characteristics and experiences. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800-04 (1979). Kinsey concluded that sexual preference exists on a continuum. A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948). A more recent study of the Institute for Sex Research also examines the homosexual-heterosexual continuum. A. BELL & M. WEINBERG, *HOMOSEXUALITIES—A STUDY OF DIVERSITY AMONG MEN & WOMEN* 53-61 (1978). See also Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L. J. 1131 (1979). A definition of a homosexual person for purposes of this Comment would be of little value. Therefore, the term "homosexual," as used in this Article, simply refers to those persons labeled by the courts as homosexual.

2. In 1979, 29 states and the District of Columbia still had statutes making homosexual acts a criminal offense. Rivera, *supra* note 1, at 949-51. The constitutionality of the Virginia sodomy statute was recently upheld against due process, freedom of expression, and privacy attacks. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E. D. Va. 1975), *Aff'd mem.*, 425 U.S. 901 (1976). Due to these and other state and federal statutes, aliens may be denied naturalization, Immigration & Naturalization Service Interpretations § 316.1(f)(7)(1976); security clearances may be denied, 32 C.F.R. § 155.5(h) (1978), Rivera, *supra* note 1, at 829-37; and applicants for professional licenses may be refused, *McLaughlin v. Board of Medical Examiners*, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353 (1973); *Florida Bar v. Kay*, 232 So. 2d 378 (Fla.), *cert. denied*, 400 U.S. 956 (1970); *State v. Kimball*, 96 So. 2d 825 (Fla. 1957); Annot., 64 A.L.R.2d 301 (1959), *contra*, In re Kimball, 40 A.D.2d 252, 339 N.Y.2d 302, *rev'd per curiam*, 33 N.Y.2d 586, 301 N.E.2d 436 (1973); Rivera, *supra* note 1, at 857 n. 349. Homosexual conduct may be grounds for refusal or removal of the child custody rights of a homosexual parent. In re Jane B., 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976); Rivera, *supra* note 1, at 883-904.

3. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); Rivera, *supra* note 1, at 813-25.

4. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

5. *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977). But see *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

6. *Matlovich v. Secretary of the Air Force*, 414 F. Supp. 690 (D.D.C. 1976), *rev'd*, 591 F.2d 852 (D.C.Cir. 1978); *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977); Rivera, *supra* note 1, at 837-55.

7. "Private employment" is defined, for the purposes of this Article, as any employment *not* in a federal, state, or local government position.

Legal theories available for redress of discrimination in private employment include assertion of rights based upon Title VII,<sup>8</sup> 42 U.S.C. § 1985(c),<sup>9</sup> the National Labor Relations Act,<sup>10</sup> common-law tort and contracts doctrines, and state and local statutes and ordinances. This Comment will examine the issues that accompany the process of securing protection for the rights of gay people in private employment. It will examine current legal responses to private employment discrimination against gay people and will consider the applicability of theories based on federal civil rights statutes, state statutes, and the common law attempts to remedy such discrimination. This Comment then will review the policy considerations that often are an essential element of an attorney's advocacy of gay clients' rights and of a campaign for protective legislation. In conclusion, this Comment will recommend a course of future action that may facilitate protection of the rights of gay people.

## I. THE LAW—WHAT TO MAKE OF IT

### A. Overview

The rights of gay people in private employment have received little legislative protection. There exist no federal or state statutes that expressly prohibit discrimination against gay people in private employment; recently enacted city and county ordinances provide protection for privately employed gay people in only scattered areas of the United States.<sup>11</sup>

Few reported American cases address the rights of gay people in private employment. Most of those cases that do face the issues summarily deny claims of protection brought under Title VII of the Civil Rights Act of 1964.<sup>12</sup> Two recent cases, however, have undertaken a relatively thorough analysis of Title VII attacks on private employment discrimination against gay people.

*DeSantis v. Pacific Telephone & Telegraph Co.*<sup>13</sup> was a consolidation of two civil rights actions claiming employment discrimination based on sexual preference.<sup>14</sup> The claimants alleged violations of Title VII and 42 U.S.C. § 1985(c).<sup>15</sup> The plaintiffs in one action were three gay males. One was allegedly not hired because of his homosexuality, the other two were allegedly forced to quit by the harassment of co-workers and supervisors.

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8. 42 U.S.C. §§ 2000e to 2000e-17(1976).

9. 42 U.S.C. § 1985(c)(1976).

10. 29 U.S.C. §§ 151-169 (1976).

11. See note 213 *infra*.

12. *E.g.*, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Smith v. Liberty Mutual Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

13. 608 F.2d 327 (9th Cir. 1979).

14. A third civil rights action was also involved, alleging discrimination on the basis of effeminacy. *Id.* at 328.

15. *Id.*

The three plaintiffs also challenged Pacific Telephone & Telegraph's alleged hiring policy that excluded homosexual persons from employment.<sup>16</sup> The plaintiffs in the second action were two lesbian operators alleging discrimination and eventual dismissal because of their known lesbian relationship. The Ninth Circuit Court of Appeals affirmed the district court's decisions,<sup>17</sup> dismissing both of the complaints for failure to state claims under either statute.<sup>18</sup> The court held that gay people are not protected under Title VII.<sup>19</sup> The section 1985(c) claim was dismissed because the court decided that homosexuals do not constitute a "class" within that statute's protection.<sup>20</sup>

*Gay Law Students Association v. Pacific Telephone & Telegraph Co.*<sup>21</sup> was a civil rights action in which plaintiffs claimed that a public utility's employment practices discriminated against gay people. The action was brought by individuals and organizations working to promote equal rights for gay persons. In contrast to *DeSantis*, this case established several bases for attacks on private discrimination against gay employees, at least in California. The Superior Court, sitting in San Francisco, entered judgment for the employer,<sup>22</sup> but the Supreme Court of California reversed.<sup>23</sup> That court held that the complaint stated a cause of action under the equal protection clause of the California Constitution,<sup>24</sup> a California Public Utilities Code nondiscrimination provision,<sup>25</sup> and California Labor Code provisions protecting employees' right to engage in political activity.<sup>26</sup> The analyses of the courts in both *Gay Law Students* and *DeSantis* concerning the applicability of the theories considered in those cases will be examined in the sections reviewing each theory.

#### B. *Current Legal Theories that May Offer Remedies*

There are existing statutory and common law theories that may offer protection from discrimination against gay people in private employment. Any of these theories might provide a remedy for people who have suffered discrimination in private employment based on their sexual preference. The sections that follow will examine a number of these theories, which are grounded in the following areas of law: Title VII, 42 U.S.C. § 1985(c),

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 329-32.

20. *Id.* at 332-33.

21. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

22. The court of appeals affirmed the superior court decision. 65 Cal. App. 3d 608, 135 Cal. Rptr. 465 (1977).

23. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (the court affirmed the decision insofar as it held that the Fair Employment Practice Act did not encompass the discrimination at issue).

24. *Id.* at 467-75, 595 P.2d at 597-602, 156 Cal. Rptr. at 19-24.

25. *Id.* at 475-86, 595 P.2d at 602-09, 156 Cal. Rptr. at 25-31.

26. *Id.* at 486-89, 595 P.2d at 609-11, 156 Cal. Rptr. at 31-33.

National Labor Relations Act and labor contracts, tortious dismissals based on political acts, state and local law, and employers' nondiscrimination policies.

### 1. Title VII

Title VII of the Civil Rights Act of 1964<sup>27</sup> prohibits discrimination in private employment based on classification of employees by race, color, religion, sex, or national origin. Sexual preference is not one of the prohibited categories listed in the text of the statute. Courts have consistently held that sex, within the meaning of the statute, does not include sexual preference as an impermissible classification.<sup>28</sup>

Gay rights advocates are struggling to amend Title VII to establish clear protection of the employment rights of gay people.<sup>29</sup> So far, none of their proposals have been enacted, although an amendment to Title VII would be the simplest way to protect the rights of gay people in private employment.

Until an amendment to Title VII does guarantee protection, litigants will continue to argue whether the present statutory language impliedly contemplates protection of gay people. Two theories supporting protection of gay people under Title VII have been suggested. A theory based on the alleged disparate impact on males resulting from discrimination against gay persons has been gaining popularity among commentators in the field of employment discrimination.<sup>30</sup> The second theory is that sexual preference should be held to be an impermissible classification because discrimination on the basis of sexual preference frustrates Congress' intent to protect employees from discrimination based on irrelevant stereotypes.<sup>31</sup>

27. 42 U.S.C. §§ 2000e to 2000e-17 (1976). Section 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer-

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would . . . adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-2 sets out similar nondiscrimination requirements with respect to employment agencies, labor organizations, and training programs, in subsections (b), (c), and (d), respectively.

28. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd without published opinion*, 570 F.2d 354 (9th Cir. 1978). See also note 212 *infra*.

29. Proposed bills to amend Title VII include: H.R. 2074, 96th Cong., 1st Sess. (1979); H.R. 8269, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 7775, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 166, 94th Cong., 1st Sess. (1975).

30. G. COOPER, H. RABB & H. RUBIN, *FAIR EMPLOYMENT LITIGATION* 297 (1975); Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 561-68 (1979); Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 506-11 (1976); Rivera & Galvan, *Homosexuals and Title VII*, 3 TEX. S.L. REV. 126, 136-40 (1975).

31. See text accompanying notes 54-72 *infra*.

a. *The Disparate Impact Theory*

In *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>32</sup> the plaintiffs argued that discrimination on the basis of homosexuality has a disparate impact on males and, therefore, violates Title VII's prohibition of discrimination on the basis of sex.<sup>33</sup> This argument is based on a United States Supreme Court interpretation of Title VII set forth in *Griggs v. Duke Power Company*,<sup>34</sup> in which the Court held that the Act proscribes not only overt discrimination, but also "practices that are fair in form, but discriminatory in operation."<sup>35</sup> If the discriminatory practice could not be shown to be "related to job performance," the Court held that the practice would be prohibited, regardless of the employer's intent.<sup>36</sup>

The contention that discrimination against gay people has a disproportionate impact on males rests upon two premises. First, some social scientists have reported that the incidence of homosexuality is greater in the male population.<sup>37</sup> Second, through the existence of military and arrest records that indicate sexual preference, an employer is more likely to discover the sexual preference of a gay male than that of a lesbian.<sup>38</sup>

In *DeSantis*, plaintiffs argued that, because of this disparate impact on males, discrimination against gay people in private employment falls within the Title VII prohibition of discrimination on the basis of sex. The Ninth Circuit rejected this proposed application of the *Griggs* disparate impact theory of discrimination against gay people,<sup>39</sup> indicating that the disparate impact standard should be limited in application to situations that will effect Congressional objectives.<sup>40</sup> A judicial grant of Title VII protection to gay people would, according to the court, frustrate a perceived Congressional intent to deny Title VII protection to gay people.<sup>41</sup> Indeed, a number of bills have been introduced in Congress to add sexual preference to the list of Title VII impermissible classifications, but none have been enacted.<sup>42</sup> This Congressional refusal to amend Title VII, however, is not necessarily indicative of an intent to prohibit Title VII

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32. 608 F.2d 327 (9th Cir. 1979).

33. *Id.* at 329.

34. 401 U.S. 424 (1971).

35. *Id.* at 431.

36. *Id.* at 431-32.

37. J. GAGNON & W. SIMON, *SEXUAL CONDUCT* 177 n. 2 (1973); D. J. WEST, *HOMOSEXUALITY* 39-42 (1967).

38. Rivera & Galvan, *supra* note 30, at 136-37; Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 647, 740 (1966). See generally, G. COOPER, H. RABB & H. RUBIN, *supra* note 30, at 297-98.

39. 608 F.2d 327, 330-31 (9th Cir. 1979).

40. *Id.* at 330.

41. *Id.*

42. See note 29 *supra*.

protection of gay people. Clearly, one of the objectives of Title VII is to protect against employment discrimination based upon the sex of an applicant. The *DeSantis* court apparently believed that Congress would be willing to sacrifice this protection to the extent that enforcing Title VII extended protection to gay people. Judge Sneed, in his concurring and dissenting opinion in *DeSantis*, rejected the majority's conclusion that the plaintiffs' assertion of the *Griggs* disparate impact theory was an artifice to bootstrap protection for gay people.<sup>43</sup> Judge Sneed felt that if a disproportionate impact on males could be established, a violation of Title VII would exist.<sup>44</sup>

Even if the disparate impact theory is held to be applicable, there exist great difficulties of proof.<sup>45</sup> A litigant must establish that the discrimination against gay employees or applicants has a disproportionate impact on males as a class.<sup>46</sup> It is not enough that proportionately more gay men than lesbians suffer.<sup>47</sup> A showing of a disproportionate impact on males probably will have to be made using a population in which gay males are a large proportion of the total applicable male population.<sup>48</sup>

Illustrating the previous point, it was a lack of proof of a disparate impact on males that caused dismissal of a sex discrimination claim based on *Griggs*' disparate impact standard in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*<sup>49</sup> In that case, the California court questioned *Griggs*' applicability to males as a class, but went on to hold that, even assuming *Griggs* applied, no showing of disparate impact had been made.<sup>50</sup> The court noted that it did not appear that Pacific Telephone & Telegraph had excluded a significant number of males.<sup>51</sup> No statistical proof was offered to establish the disproportionate impact on males of discrimination against gay people. Apparently, statistical proof will be required by the courts to verify a claim of disparate impact.

Beyond the difficulties of proof, there is another serious problem with applying the disparate impact standard to obtain protection of employment rights of gay people: it is counterproductive. To avoid disparate impact liability under Title VII, employers need only be careful to discriminate equally against lesbians and gay men. While it is true that gay males generally are more visible due to military and arrest records,<sup>52</sup> the expanding role of women in the military may alter that situation.

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43. 608 F.2d 327, 333-34 (9th Cir. 1979).

44. *Id.*

45. *Id.* at 333.

46. *Id.*

47. *Id.*

48. *Id.*

49. 65 Cal. App. 3d 608, 135 Cal. Rptr. 465 (1977), *aff'd in part and rev'd in part on other grounds*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

50. *Id.* at 618, 135 Cal. Rptr. at 470.

51. *Id.*

52. *See* note 38 *supra*.

Moreover, to establish equal treatment sufficient to avoid disparate impact liability, employers may resort to firing more lesbians than are known to be employed, by also dismissing those employees *suspected* of being lesbians. The woman who possesses traits most commonly associated with male roles<sup>53</sup> will be an obvious choice for discrimination. Though the disparate impact theory is grounded in a search for protection of gay civil rights, encouraging harassment of gay women and heterosexual women who deviate from the cultural female norm is not the way to establish gay people's rights in private employment. There is a much more positive theory that would establish gay employment rights through Title VII.

#### b. *Sexual Stereotypes*

Discrimination on the basis of sexual preference frustrates Congress' intent to protect employees from discrimination based on irrelevant stereotypes.<sup>54</sup> To implement Congressional intent, courts should construe the term "sex," as used in Title VII, to include sexual preference as an impermissible classification.<sup>55</sup>

This Congressional intent to prohibit employment discrimination based on stereotypes was recognized in *Phillips v. Martin Marietta Corp.*,<sup>56</sup> a challenge to Martin Marietta Corporation's policy of not accepting employment applications from women with preschool-age children.<sup>57</sup> A majority of the Supreme Court, in a per curiam opinion, held that all parents with preschool-age children must be subject to the same hiring policy, unless the existence of a family is "demonstrably more relevant to job performance for a woman. . . ."<sup>58</sup> The Court noted that a demonstration that the sex of a parent-applicant was relevant to job performance arguably could be a basis for discriminatory hiring policies, but held that insufficient evidence had been presented to support a decision concerning whether specific family obligations of a woman are a bona fide

53. Aggressiveness, ambition, assertiveness, career-orientation, and self-reliance, for example, are traits generally associated with male roles.

54. For cases holding that discrimination based on sexual preference per se is arbitrary, see *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 467, 595 P.2d 592, 597, 156 Cal. Rptr. 14, 19 (1979). The American Law Institute has observed: "This area of private morals is the distinctive concern of spiritual authorities." Note, *Homosexuality and the Law—an Overview*, 17 N.Y.L.F. 273, 299 (1971) (footnote omitted). "The American Psychiatric Association stated, during 1973, that homosexuality is not a personality disorder and recommended that all discrimination against homosexuals, including employment discrimination, should cease." G. COOPER, H. RABB & H. RUBIN, *supra* note 30, at 277.

55. The theory discussed in this section, based upon Justice Marshall's concurring opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), was suggested in Rivera, *supra* note 1, at 807.

56. 400 U.S. 542 (1971). *Accord*, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717 (7th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (5th Cir. 1969). The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex provide in part: "(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: . . . (ii) the refusal to hire an individual based on stereotyped characterizations of the sexes." 29 C.F.R. § 1601.1(a)(1979).

57. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542-43 (1971).

58. *Id.* at 544.

occupational qualification.<sup>59</sup> Justice Marshall disagreed that two hiring policies, their application dependent on the sex of the applicant, could be justified.<sup>60</sup> In his concurring opinion, Justice Marshall said:

[T]he Court has fallen into the trap of assuming that [Title VII] permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

. . . Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes. . . . Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.<sup>61</sup>

This Congressional objective<sup>62</sup> will be furthered by extending Title VII protection to gay people.

Certainly a legitimate argument exists that discrimination on the basis of sexual preference is "based on stereotyped characterizations of the sexes."<sup>63</sup> The person who displays characteristics stereotypically inappropriate to his/her gender, especially the effeminate male, is the most likely person to be suspected of being gay. The sexual stereotype most obviously rejected by every gay person is the one dictating that a person's sexual preference should be solely for persons of the opposite gender. The most basic reason that lesbians suffer discrimination is that the object of their sexual attention is of a gender stereotypically inappropriate for a woman.

In two recent cases, the courts have equated homosexuality with displaying characteristics stereotypically inappropriate to one's gender. In 1969, an applicant who "displayed characteristics inappropriate to his sex" was denied a job in an insurance company mail room.<sup>64</sup> The district court, in *Smith v. Liberty Mutual Insurance Co.*,<sup>65</sup> held that this applicant had no Title VII claim because Congress had not forbidden discrimination based on sexual preference.<sup>66</sup> The court equated effeminacy in the male applicant with homosexuality, though the court's opinion cites no evidence that the applicant was gay. *Strailey v. Happy Times Nursery School*,<sup>67</sup> consolidated with *DeSantis*, involved a teacher who was terminated because he wore an earring to school before the school year started.<sup>68</sup> The Ninth Circuit said that Title VII does not ban discrimination based on sexual preference and thus does not ban discrimination based on effeminacy.<sup>69</sup> In

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59. *Id.*

60. *Id.* at 544-47 (Marshall, J., concurring).

61. *Id.* at 545 (Marshall, J., concurring).

62. *Id.*; see note 56 and accompanying text *supra*.

63. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

64. *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 n.2 (N.D. Ga. 1975).

65. *Id.* at 1099-1101.

66. *Id.* at 1101.

67. 608 F.2d 327 (9th Cir. 1979).

68. *Id.* at 328. No evidence that *Strailey* was gay appears in the court's opinion.

69. *Id.* at 331-32.



both of these cases, the courts equated homosexuality with males' display of effeminate characteristics.

A woman's display of masculinity or a man's display of effeminacy is the most likely cause of discrimination based on suspected homosexuality. Congress, through Title VII, intended to prohibit discrimination based on stereotyped ideas of the proper role of a woman or a man.<sup>70</sup> Justice Marshall, in *Phillips v. Martin Marietta Corporation*, recognized that "characterizations of the proper domestic roles of the sexes" were not legitimate bases for discrimination.<sup>71</sup> Likewise, characterizations of the proper sexual roles of the sexes are not legitimate bases for discrimination. Neither domestic nor sexual role is relevant to employment opportunity.<sup>72</sup> Thus, to implement Congressional intent, courts should construe the term "sex," as used in Title VII, to include sexual preference as an impermissible classification.

## 2. 42 U.S.C. § 1985(c)

Another possible avenue for legal redress of private employment discrimination against gay people is 42 U.S.C. § 1985(c).<sup>73</sup> Section 1985(c)<sup>74</sup> prohibits any conspiracy to deprive any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the law, resulting in another's injury, in person or property, or deprivation of a right or privilege of a United States citizen.<sup>75</sup> Recovery under this section by gay people who are subjected to private employment discrimination, however, is not assured. Potential obstacles include satisfaction of the conspiracy requirement, recognition of gay people as a class protected by the section, and proof of deprivation of a protected right.

### a. *Conspiracy*

Employment discrimination claims brought under section 1985(c) usually should allege that a business's employees or agents implement policies or practices that constitute a prohibited conspiracy. Section

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70. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544-47 (1971); see note 56 and accompanying text *supra*.

71. *Id.* at 545 (Marshall, J., concurring).

72. See note 54 *supra*.

73. 42 U.S.C. § 1985(c)(1976)(formerly § 1985(3)) states in part:

If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages. . . .

74. The statute's predecessor was enacted as part of the Ku Klux Klan Act, ch. 33, 12 Stat. 284 (1861).

75. 42 U.S.C. § 1985(c)(1976).

1985(c) claims against corporate defendants have been met with the argument that officers and directors of a single corporation cannot legally form a conspiracy, as is required by the statute. The federal circuit courts disagree on the proper resolution of this issue. The Second Circuit Court of Appeals, in *Herrmann v. Moore*,<sup>76</sup> held that concerted action among corporate employees cannot establish a conspiracy for purposes of section 1985(c). This decision was based on the theory that a corporation, as a legal person, cannot conspire with itself.<sup>77</sup> This corporation/person theory was found to be inapposite by the Third Circuit in *Novotny v. Great American Federal Savings & Loan Association*,<sup>78</sup> in which it was alleged that individual corporate employees had conspired to discriminate. That court held that "concerted action among corporate officers and directors [can] constitute a conspiracy under § [1985(c)],"<sup>79</sup> expressly declining to follow *Herrmann*.<sup>80</sup> This position is supported by a series of cases holding that criminal conspiracies may result from the acts of officers and directors of one corporation.<sup>81</sup> The only directly relevant United States Supreme Court decision, *Pennsylvania Railroad System & Allied Lines Fed. No. 90 v. Pennsylvania Railroad*,<sup>82</sup> accepted without question the contention that the acts of corporate officers constituted a conspiracy for purposes of a conspiracy requirement similar to that of section 1985(c).

Even if a court will not accept the possibility of a conspiracy within the employing corporation, the existence of a conspiracy may still be established. Section 1985(c) requires only that "two or more persons . . . conspire"<sup>83</sup> to deprive a person of his/her civil rights. Therefore, the discriminatory practices of employers in a particular industry or within a particular geographical area may evidence a conspiracy to exclude gay people. Conspiracies also may exist in the discriminatory practices of unions and hiring halls.

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76. 576 F.2d 453 (2d Cir. 1978). *Accord*, *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). *Accord*, *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (limiting holdings to situations involving "a single act of discrimination by a single business entity").

77. This theory was established in *Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911, 914-15 (5th Cir. 1952).

78. 584 F.2d 1235 (3d Cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2345 (1979) (42 U.S.C. § 1985(c) and 42 U.S.C. § 2000e (Title VII) action by employee dismissed because of his advocacy of equal employment opportunity for women).

79. *Id.* at 1259 (footnote omitted).

80. *Id.* at 1260.

81. *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943) (conspiracy to make illegal political contribution); *Minnisohn v. United States*, 101 F.2d 477 (3d Cir. 1939); *Barron v. United States*, 5 F.2d 799, 799-801 (1st Cir. 1925) (conspiracy to conceal assets of bankrupt corporation); *United States v. Kemmel*, 160 F. Supp. 718, 720-21 (M.D. Pa. 1958) (conspiracy to defraud the United States; collecting cases).

82. 267 U.S. 203 (1925). In this case, in which a claim was brought under a predecessor statute to 18 U.S.C. § 241 (1976)—which has a similar conspiracy requirement—no doubt was raised regarding the viability of a conspiracy of officers of one corporation.

83. 42 U.S.C. § 1985(c)(1976).

b. *Protected Class*

In addition to the existence of a conspiracy, a section 1985(c) complainant must also establish the existence of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>84</sup> This requirement was established by the United States Supreme Court in *Griffin v. Breckenridge*,<sup>85</sup> partly to avoid the constitutional issues that would be raised by the establishment of a general federal tort law.<sup>86</sup> The Court also perceived a Congressional intent to limit section 1985(c)'s remedies to actions motivated by class-based animus.<sup>87</sup>

Although the conspiracy alleged in *Griffin* was directed against black persons, courts construing section 1985(c) have not limited its protection to racial classifications. The Ninth Circuit, in *Life Insurance Co. of North America v. Reichardt*,<sup>88</sup> held that women purchasers of disability insurance constitute a class for purposes of section 1985(c). The court did not specify the characteristics of a protected class, but did note that gender-based classifications could result in invidious discrimination<sup>89</sup> and that the class involved in *Reichardt* was clearly defined.<sup>90</sup> The court also recognized that the drafters of section 1985(c) intended to protect other groups in addition to oppressed southern blacks.<sup>91</sup> The Third Circuit, in *Novotny v. Great American Federal Savings & Loan Association*,<sup>92</sup> also emphasized the breadth of section 1985(c) protection, holding that the statute prohibited conspiracies against women. That court declared that legislators' expectations of the limits of section 1985(c)'s protection would not restrict the interpretation of contrary statutory language.<sup>93</sup> The court emphasized the changing nature of community prejudices and the evolving ideal of equality supported by the statutory language.<sup>94</sup> Some of the other classes that have been held to be protected by section 1985(c) include political opponents,<sup>95</sup> supporters of a political candidate,<sup>96</sup> persons holding a certain political view,<sup>97</sup> members of the Jewish faith,<sup>98</sup> and members of a single family.<sup>99</sup> It is clear that section 1985(c) "has been

84. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (§ 1985(c) action alleging conspiracy to deprive black persons of their civil rights).

85. 403 U.S. 88 (1971).

86. *Id.* at 102.

87. *Id.*

88. 591 F.2d 499 (1979).

89. *Id.* at 505 n. 16.

90. *Id.*

91. *Id.*

92. 584 F.2d 1235 (3d Cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2345 (1979).

93. *Id.* at 1241.

94. *Id.* at 1241-43.

95. *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

96. *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973).

97. *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971).

98. *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973).

99. *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972).

liberated from the now anachronistic historical circumstances of reconstruction America. . . ."<sup>100</sup>

Extension of the scope of section 1985(c) to include protection of the civil rights of gay people may clearly be supported by the relevant case law. Those who conspire to deprive gay people of their civil rights are acting on a class-based, invidiously discriminatory animus. It is true that a definition of who will be included in the class of gay people is difficult to articulate. There are no clear objective criteria, the existence of which establish one's homosexuality.<sup>101</sup> On a continuum of sexual preference, most Americans fall somewhere between exclusive heterosexuality and exclusive homosexuality.<sup>102</sup> One person might be labeled gay at one point in his/her life and heterosexual at another.<sup>103</sup> Regardless of the definition used, once a person is labeled as gay, discrimination against the person on that basis is class-based discrimination.

Nevertheless, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit refused to recognize section 1985(c) protection for gay people's civil rights because the court perceived no *other* special federal protection of the rights of gay people.<sup>104</sup> That court would grant section 1985(c) protection to groups that require and warrant special federal protection.<sup>105</sup> Such a limitation on the coverage of section 1985(c) might be reasonable.<sup>106</sup> The Ninth Circuit, however, did not analyze the needs of gay people or the justifications for protecting the rights of gay people. Instead, the court further limited section 1985(c) protection—indicating that unless a group already had been granted special federal protection, it would not qualify as a class for purposes of section 1985(c).<sup>107</sup> Other groups that enjoy no other special federal protection but have been granted section 1985(c) protection include political opponents,<sup>108</sup> supporters of a political candidate,<sup>109</sup> people with a certain political view,<sup>110</sup> and members of a single family.<sup>111</sup> The *DeSantis* court did not discuss recognition of these other classes, so it is not clear if the Ninth Circuit would not recognize

100. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979).

101. *Dunlap*, *supra* note 1.

102. A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 1, at 638-43; A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 469-74 (1953).

103. Reportedly, many men have homosexual experiences before the age of twenty that are not repeated later in life. J. GAGNON & W. SIMON, *supra* note 37, at 131. See *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963) (married father who engaged in same-sex behavior in late teens labeled and treated as homosexual).

104. 608 F.2d 327, 333 (1979).

105. *Id.*

106. In fact, gay people have been considered to be a group that requires and warrants special federal protection. See text accompanying notes 112-118 *infra*.

107. *Id.*

108. *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

109. *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973).

110. *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971).

111. *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972).

protection of these classes or if, for some reason, a different standard was applied to gay people.<sup>112</sup>

The *DeSantis* court offered two examples of evidence of special federal protection that might qualify a class for section 1985(c) protection.<sup>113</sup> The first is inclusion within the enumerated protected classes of Title VII.<sup>114</sup> This is not a particularly useful standard. A recent Supreme Court decision has held that deprivation of a right created by Title VII cannot be remedied through a section 1985(c) claim.<sup>115</sup> Therefore, if Title VII protection is required to establish existence of a section 1985(c) protected class, section 1985(c) will be rendered virtually worthless for employment discrimination purposes.

The second example of evidence of special federal protection is designation by the courts as a "suspect" or "quasi-suspect" classification for purposes of fourteenth amendment equal protection analysis.<sup>116</sup> Generally, a state's classification of individuals for differing treatment must be rationally related to a legitimate government interest to survive constitutional scrutiny.<sup>117</sup> If differing treatment is based on a quasi-suspect classification, such as sex, the classification must have a fair and substantial relationship to an important government interest to be upheld.<sup>118</sup> If a suspect classification is involved, the classification must be necessary to promote a compelling state interest.<sup>119</sup>

No court has yet held that sexual preference is a quasi-suspect or suspect classification. Persuasive arguments exist, however, for the inclusion of sexual preference as at least a quasi-suspect basis for classification. The characteristics of a suspect class traditionally include being "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>120</sup> In this case, the lack of explicit statutory protection of the civil rights of gay people is evidence that gay people are politically powerless. If gay people had power, they would establish

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112. Sneed, J., concurring and dissenting in *DeSantis*, was persuaded that gay people were not protected by § 1985(c) by Congress' specific refusal to prohibit discrimination against gay people. 608 F.2d at 334 n.1. Though many bills protecting gay people have been proposed, *see note 29 supra*, none have been enacted. This is not necessarily indicative of a general Congressional intent to deny protection for gay people, however, since it may simply be political inexpedience that keeps members of Congress from voting in favor of protection of this oppressed minority.

113. 608 F.2d 327, 333 (9th Cir. 1979).

114. *Id.*

115. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 99 S. Ct. 2345 (1979).

116. 608 F.2d 327, 333 (9th Cir. 1979).

117. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961); *Goeseart v. Cleary*, 335 U.S. 464 (1948).

118. A quasi-suspect classification is a classification to which the intermediate test is applied. Gender is one example of a quasi-suspect classification. *Craig v. Boren*, 429 U.S. 190 (1976).

119. *Loving v. Virginia*, 388 U.S. 1 (1967).

120. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

statutory protection for themselves.<sup>121</sup> Gay people also have been subject to a history of purposeful unequal treatment.<sup>122</sup> Two additional characteristics that distinguish a suspect or quasi-suspect status from nonsuspect statuses are immutability of characteristics and the fact that the status "frequently bears no relation to ability to perform or contribute to society."<sup>123</sup> Psychologists and psychiatrists increasingly are asserting that homosexuality is an immutable<sup>124</sup> characteristic.<sup>125</sup> Homosexuality frequently bears no relation to ability to perform or contribute to society.<sup>126</sup> One psychologist reports that "most people who are involved in homosexuality . . . are sufficiently integrated into the mainstream of everyday life to comfortably fit in. . . ."<sup>127</sup> Since classifications based on sexual preference are marked by those characteristics that distinguish a suspect or quasi-suspect class, the absence of recognition as a suspect class is not a persuasive ground for distinguishing gay people from suspect or quasi-suspect classes that receive section 1983(c) protection.

Even if one accepts the *DeSantis* majority requirement of other special federal protection, the requirement does not exclude gay people as a protected class. It appears that there presently exists at least minimal federal protection of the employment rights of gay people. First, the Civil Service Regulations' guidelines establish special protection from arbitrary discrimination against gay people in federal employment.<sup>128</sup> Another example of special federal protection is in the recognition of gay persons' claims under 42 U.S.C. § 1983.<sup>129</sup> Federal courts are in agreement that

121. See text accompanying note 11 *supra*.

122. D. ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* 42-69 (1971); Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019, 1020-25 (1979).

123. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (footnote omitted); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243 (3d cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2345 (1979).

124. Immutable is defined to be: "not capable or susceptible of change" WEBSTER'S, *supra* note 1, at 1131.

125. "[T]he Kinsey Research made a concerted effort over a period of years to find and evaluate the histories of people whose [sexual preference] had changed either during or following therapy of any kind. None was ever found." C. TRIPP, *THE HOMOSEXUAL MATRIX* 236-38 (1975). For a general review of the literature on the subject, see D. WEST, *HOMOSEXUALITY RE-EXAMINED* 241-75 (1977).

126. See *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (homosexuality itself is not evidence of unfitness to teach); Civil Service Regulations, *supra* note 112; A. BELL & M. WEINBERG, *supra* note 1, at 141-48. Further evidence can be found in the number of private employers with nondiscrimination policies. See text accompanying notes 226-31 *supra*.

127. C. TRIPP, *supra* note 131, at 140.

128. The "Suitability Guidelines for Federal Employment" for determining "Infamous or Notoriously Disgraceful Conduct" provide in part:

Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.

*Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 255 n.15 (9th cir. 1976), *vacated*, 429 U.S. 1034 (1977) (citing 5 C.F.R. § 731.202(b) (1979)).

129. 42 U.S.C. § 1983 (1976). The statute provides:

section 1983 protects against deprivation of a gay person's civil rights under color of state law. In *McConnell v. Anderson*,<sup>130</sup> a section 1983 suit brought by a gay male librarian denied public employment because of his sexual preference, the court held that to reject an applicant for public employment, one must show an observable and reasonable relationship between efficiency on the job and homosexuality.<sup>131</sup>

The predecessors of both section 1983 and section 1985(c) were included in the Ku Klux Klan Act when enacted.<sup>132</sup> Since Congress considered the sections at the same time, and they were joined in one act, it seems likely that the intended scope of protection was the same for both. Thus, the protections afforded by section 1983 are relevant to a determination of the scope of section 1985(c). The Third Circuit in *Novotny*<sup>133</sup> noted that the acceptance of section 1983 claims of discrimination lends weight to an argument that section 1985(c) protection should be recognized, because of the joint enactment of their predecessor statutes.<sup>134</sup> The *DeSantis* court does not mention these protections, so it is not known whether they were rejected as unacceptable evidence of special federal protection or simply not considered.

### c. Protected Rights

Even if section 1985(c) protection is expanded to gay people, a final obstacle may prevent a section 1985(c) remedy in cases of private employment discrimination. The person who has suffered discrimination must have been deprived of a right that is afforded protection by section 1985(c). The federal courts of appeals are split on the issue of which rights are protected from deprivation by section 1985(c). Judicial interpretation of the statutory language, "equal protection of the laws, or . . . equal privileges and immunities under the laws,"<sup>135</sup> is complicated by the often unspoken issue of which rights Congress has the constitutional power to protect.

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 may provide a remedy for discrimination in private employment, if state action can be established. Factors that support a finding of state action are: (1) entanglement between public and private entities, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); (2) performance of a "public function", *Marsh v. Alabama*, 326 U.S. 501 (1946); (3) public financial support, *Norwood v. Harrison*, 413 U.S. 455 (1973); (4) legal support or encouragement of private action, *Shelley v. Kraemer*, 334 U.S. 1 (1948). In more recent decisions, the Supreme Court has refused to find state action in relatively private entities. *E.g.*, *Moose Lodge v. Iris*, 407 U.S. 163 (1972) (liquor licensing does not establish state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (utility monopoly regulated by public commission does not constitute state action).

130. 316 F. Supp. 809 (D. Minn. 1970), *rev'd on other grounds*, 451 F.2d 193 (8th Cir. 1971).

131. *Id.* at 814.

132. Ch. 33, 12 Stat. 284 (1861).

133. 584 F.2d 1235 (3d Cir. 1978), *rev'd on other grounds*, 99 S.Ct. 2345 (1979).

134. *Id.* at 1242 n.26.

135. 42 U.S.C. § 1985 (c) (1976).

In *Griffin v. Breckenridge*,<sup>136</sup> the United States Supreme Court held that section 1985(c) protects the right to equal protection of the laws and the right to interstate travel, and prohibits discrimination on the basis of race.<sup>137</sup> The courts of appeals are in accord on the scope of section 1985(c)'s application to racial discrimination and interstate travel,<sup>138</sup> but their interpretations of the provision's application to equal protection of the laws have varied widely.

There exists considerable disagreement whether section 1985(c) creates substantive rights or only provides remedies for the deprivation of existing rights.<sup>139</sup> At one extreme, the Eighth Circuit, in *Action v. Gannon*,<sup>140</sup> held that section 1985(c) extended the right to equal treatment by the states, guaranteed by the fourteenth amendment, to a right to equal treatment by private persons. At the opposite extreme, the Fifth Circuit, in *McLellan v. Mississippi Power & Light Co.*,<sup>141</sup> held that the object of a conspiracy must be independently illegal before section 1985(c) can protect against that conspiracy. Most courts hold that section 1985(c) protects against the deprivation of legally protected rights, the sources of which are outside the Act.<sup>142</sup>

There is further disagreement whether the source of the rights protected by section 1985(c) include federal constitution, federal statutes, and perhaps even state law. In *Novotny v. Great American Federal Savings & Loan Association*,<sup>143</sup> the Justices of the United States Supreme Court expressed differing opinions on this issue. Justice Powell would limit the scope of the "equal protection" language of section 1985(c) to protection of fundamental constitutional rights.<sup>144</sup> Justice Stevens would protect only constitutional rights, including the general fourteenth amendment right to receive equal treatment from the state.<sup>145</sup> The majority in *Novotny* and the three dissenting Justices would generally extend the scope of section 1985(c)'s "equal protection" language to protect federal statutory as well as constitutional rights.<sup>146</sup> The Ninth Circuit, in *Life Insurance Co. of North America v. Reichardt*,<sup>147</sup> has gone even further,

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136. 403 U.S. 88 (1971).

137. *Id.* at 97.

138. *E.g.*, *Life Ins. Co. of N. America v. Reichardt*, 591 F.2d 499, 503 (9th Cir. 1979); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828-29 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), *aff'd as amended*, 581 F.2d 658 (7th Cir. 1978).

139. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1246-48 (3d Cir. 1978), *rev'd on other grounds*, 99 S.Ct. 2345 (1979).

140. 450 F.2d 1227, 1234-35 (8th Cir. 1971).

141. 545 F.2d 919, 924-28 (5th Cir. 1977)(*en banc*).

142. *E.g.*, *Life Ins. Co. of N. America v. Reichardt*, 591 F.2d 499, 503 (9th Cir. 1979); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1247-51 (3d Cir. 1978), *rev'd on other grounds*, 99 S.Ct. 2345 (1979).

143. 99 S.Ct. 2345 (1979).

144. *Id.* at 2352-53.

145. *Id.* at 2353-55.

146. *Id.* at 2349-52, 2356-58.

147. 591 F.2d 499 (9th Cir. 1979).



holding that violations of state-conferred rights and privileges offend the statute.<sup>148</sup> The court declared that limiting section 1985(c)'s prohibitions to the deprivation of federal rights is contrary to the purpose of the statute, and contrary to Supreme Court interpretation.<sup>149</sup> The Ninth Circuit indicated that only the motivation element of a section 1985(c) offense prevents the statute from creating a general federal tort law.<sup>150</sup>

One of the reasons that courts are reluctant to extend the scope of the rights protected by section 1985(c) is that Congress' power to prohibit private conspiracies is unclear. There are four possible sources of Congressional power to reach private conspiracies. The first two are the thirteenth amendment<sup>151</sup> and the right to interstate travel.<sup>152</sup> Neither of these sources is likely to be held to incorporate power to reach discrimination against gay people in private employment.<sup>153</sup> The third source of power is the commerce clause.<sup>154</sup> Congress has the power to prohibit certain actions which have a cumulative detrimental effect on interstate commerce.<sup>155</sup> Conspiracies against the civil rights of black persons have been held, in *Katzenbach v. McClung*,<sup>156</sup> to discourage interstate relocation of business because they cause black people to feel unwelcome. Congress has the power, based on any of these three sources of power, to reach private action. The fourth potential source of power to reach private conspiracies is section five of the fourteenth amendment.<sup>157</sup> In *United States v. Guest*,<sup>158</sup> the United States Supreme Court indicated that Congress could prohibit private interference with fourteenth amendment rights. It remains unclear whether that power is limited to prohibiting private interference with the state's performance of its duties, or whether it would reach direct private interference with a person's civil rights.<sup>159</sup> The Fourth Circuit, in *Doski v. Goldseker*,<sup>160</sup> held that although

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148. *Id.* at 505.

149. *Id.*

150. *Id.* at 505 n.14.

151. "Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . . . Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

152. *Crandall v. Nevada*, 74 U.S. (6 Wall.) 35 (1867).

153. However, a court could hold that *any* invidious discrimination was a "badge of slavery" and therefore prohibited by the thirteenth amendment. *Cf. Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968)(racial discrimination in housing was a badge of slavery).

154. "[The Congress shall have power][t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. CONST. art. I, § 8, cl. 3.

155. *Katzenbach v. McClung*, 379 U.S. 294 (1964)(power to prohibit racial discrimination in restaurant that discouraged interstate relocation of business).

156. *Id.*

157. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

158. 383 U.S. 745 (1966).

159. *Compare* *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828-29 (7th Cir. 1975), *aff'd on reh. en banc*, 581 F.2d 658 (7th Cir. 1978), *with* *Action v. Gannon*, 450 F.2d 1227, 1235 (8th Cir. 1971)(en banc).

160. 539 F.2d 1326 (1976).

Congress has the power to prohibit private interference with fourteenth amendment rights, it did not intend to do so by enacting section 1985(c). This holding seems disingenuous, however, since the predecessors of 42 U.S.C. § 1983—which expressly is limited by a state action requirement<sup>161</sup>—and section 1985(c)—which is not so limited—were enacted as part of the same statute.<sup>162</sup> It appears that, had Congress intended section 1985(c) to reach only state action, it would have included in that section an explicit state action requirement similar to that found in section 1983. This not being the case, it seems safe to conclude that Congress did not intend section 1985(c) to provide a remedy only for those instances that qualify as state action; rather, Congress' limitation on the application of section 1985(c) to private action was the conspiracy requirement.<sup>163</sup> Under this interpretation of section 1985(c), the provision can serve as the basis for a claim for relief from concerted private action to interfere with rights guaranteed by the fourteenth amendment.

Even though the *Doski* rationale can be attacked on the above-stated grounds, the present state of the law, exemplified by *Doski*, indicates that section 1985(c) does not reach private interference with fourteenth amendment rights—either because Congress is not empowered to grant such relief, or because it did not intend section 1985(c) to reach these matters. If this interpretation of section 1985(c) is accurate, then a claimant under the provision will have to establish a violation of a right guaranteed by the thirteenth amendment, a violation of the right to interstate travel, denial of a fourteenth amendment right by state action, or contravention of a commerce clause policy.

The gay complainant who has alleged discrimination in private employment may have to explore the issue of the scope of the rights protected by section 1985(c). First, Congress must have intended to protect the type of right alleged to have been infringed. If Congress intended to prohibit that deprivation, then the court must determine if Congress had the power to do so. Although private employment rights are not protected under all interpretations of the statute, the litigant, as has previously been shown, has a solid base from which to argue that protection should be granted.

### 3. *National Labor Relations Act and Labor Contracts*

Gay union members may find protection under several provisions of the National Labor Relations Act.<sup>164</sup> The Act has been interpreted to require that unions fairly represent all members.<sup>165</sup> Furthermore,

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161. 42 U.S.C. § 1983 (1976). ("under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . .")

163. *Life Ins. Co. of N. America v. Reichardt*, 591 F.2d 499, 505 n.14 (9th Cir. 1979).

164. 29 U.S.C. §§ 151-169 (1976). (This interpretation was suggested in Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U.L.Q. 527, 560-65.

165. *E.g., Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

employers are not allowed, under the Act, to interfere with union activities.<sup>166</sup> Most union contracts provide that just cause must be established to justify dismissals.<sup>167</sup> This section will consider the applicability and usefulness of each of these requirements to protect the employment rights of gay people.

The union's duty of fair representation is an affirmative duty to represent each employee on an equal basis.<sup>168</sup> Under this doctrine, an "exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."<sup>169</sup> The National Labor Relations Board (NLRB), in *Miranda Fuel Co.*,<sup>170</sup> held that the duty of fair representation also prohibits a union from "taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair."<sup>171</sup> A breach of this duty establishes a cause of action not only against the union, but also against an employer who participates in the discriminatory action.<sup>172</sup> Since the duty of fair representation is not limited to the protection of specific categories of employees, it provides a method of reaching actions that are not prohibited by other, more specific, statutes.<sup>173</sup>

Therefore, gay people in a collective bargaining unit represented by an exclusive statutory agent must have their interests represented by that agent in good faith. Any union action taken against the gay employee on the basis of sexual preference would be based on an irrelevant, invidious, or unfair classification.<sup>174</sup> Moreover, when an employer participates or acquiesces in the discriminatory action of the union, a gay employee may seek relief from the employer as well as the union.

The National Labor Relations Act prohibits an employer from interfering with union activities.<sup>175</sup> The possibility is increasing that union members will attempt to protect the rights of gay employees. The struggle to achieve protection of gay people's civil rights is slowly gaining acceptance as a civil rights movement comparable to the struggles of black

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166. 29 U.S.C. §§ 157-158 (1976).

167. Kovarsky, *supra* note 163, at 561.

168. G. COOPER, H. RABB & H. RUBIN, *supra* note 30, at 44.

169. *Vaca v. Sipes*, 386 U.S. at 177.

170. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

171. *Id.* at 185.

172. *Vaca v. Sipes*, 386 U.S. at 178.

173. G. COOPER, H. RABB & H. RUBIN, *supra* note 30, at 46. *Lundin v. Pacific Tel. & Tel. Co.*, consolidated with *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), presented a claim of failure adequately to represent lesbians' interests. The issue was not addressed in the Ninth Circuit opinion.

174. For cases holding classifications on the basis of homosexuality arbitrary, see *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 467, 595 P.2d 592, 597, 156 Cal. Rptr. 14, 19 (1979).

175. 29 U.S.C. §§ 157-158 (1976).

people and women.<sup>176</sup> In particular, a union with a substantial minority of gay members may seek fair treatment of gay employees. If the rights of gay employees are a "valid object for employee action," an employer could be liable for any interference with activities designed to achieve that object.<sup>177</sup> Alleviation of an employer's invidious discrimination based on race or national origin has been held to be a valid object, because that discrimination "inhibits its victims from asserting themselves against their employer to improve their lot."<sup>178</sup> Discrimination on the basis of sexual preference has the same prohibited effect as discrimination on the basis of race. Sexual preference discrimination inhibits gay employees from taking action to improve their employment situation because they fear reprisals based on their sexual preference. Action to protect gay employees, therefore, should be considered a valid object for employee action, and an employer should be liable for interference with union activities pursuant to that object.

Possibly more useful than statutory guarantees is the usual provision in union contracts that requires just cause to be shown for dismissal of a union member.<sup>179</sup> Arbitration is normally specified as the means for resolving disputes over the existence of just cause. Typical of language in arbitration opinions concerning the legitimacy of dismissals based on off-duty conduct is: "Arbitrators are reluctant to sustain discharges based on off-duty conduct of employees unless a direct relationship between off-duty conduct and employment is proved. Discretion must be exercised, lest Employers become censors of community morals."<sup>180</sup> Arbitrators have held that even criminal convictions do not create just cause for dismissal unless such a direct nexus between employment and the extrinsic conduct exists.<sup>181</sup> This standard is illustrated by *Babcock & Wilcox Co.*<sup>182</sup> which involved a laborer who was discharged after pleading guilty to charges of contributing to the delinquency of a minor and spending two months in

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176. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 487-88, 595 P.2d 592, 610-11, 156 Cal. Rptr. 14, 32-33 (1979).

177. 29 U.S.C. §§ 157-158 (1976). See also *United Packinghouse Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969).

178. *United Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1135 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969). This holding has not been followed by the NLRB. In *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973), enforced per curiam, 87 L.R.R.M. 3168, 75 Lab. Cas. ¶ 10405 (D.C. Cir. 1974), the Board held that discrimination per se does not violate the Labor Act; instead, there must be a connection between the discrimination and interference with rights protected by the Labor Act.

179. Kovarsky, *supra* note 163, at 561.

180. *Chicago Pneumatic Tool Co.*, 38 Lab. Arb. & Disp. Settl. 891, 893 (1961)(Duff, Arb.). *Accord*, *Menzie Dairy Co.*, 45 Lab. Arb. & Disp. Settl. 283, 288-89 (1965)(Mullin, Arb.); *Babcock & Wilcox Co.*, 43 Lab. Arb. & Disp. Settl. 242, 244 (1964) (Duff, Arb.); *Consolidated Badger Coop.*, 36 Lab. Arb. & Disp. Settl. 965, 967 (1961) (Mueller, Arb.).

181. *E.g.*, *Movielab, Inc.*, 50 Lab. Arb. & Disp. Settl. 632 (1968) (McMahon, Arb.) (employee convicted of possession of narcotics and giving narcotics to a minor); *Babcock & Wilcox Co.*, 43 Lab. Arb. & Disp. Settl. 242 (1964) (Duff, Arb.) (employee pleaded guilty to charges of contributing to the delinquency of a minor); *Lamb Glass Co.*, 32 Lab. Arb. & Disp. Settl. 420 (1959) (Dworkin, Arb.) (employee convicted of drunken driving).

182. 43 Lab. Arb. & Disp. Settl. 242 (1964)(Duff, Arb.).

prison. The arbitrator reinstated the employee, noting the lack of a direct relationship between the off-duty conduct and the employment relationship.<sup>183</sup> He explained: "Management has no authority to punish every act of immoral conduct in the community, merely because an employee is involved."<sup>184</sup>

There seems to be no general standard for establishing a direct relationship between off-duty conduct and the employment relationship. Each case is decided on its own facts, usually considering factors affecting the productivity of the business,<sup>185</sup> safety,<sup>186</sup> and the reputation of the business.<sup>187</sup> Widespread publicity is often controlling when damage to the reputation of the business is alleged, or when the possibility of a strike or economic boycott exists.<sup>188</sup>

Some contractual provisions specify violation of the morality of the community as cause for dismissal.<sup>189</sup> At least one arbitrator has held that these provisions should be held to establish the violation of statutes or ordinances as the test of immorality.<sup>190</sup>

If an employee's duties include contact with the public, arbitrators have been more likely to find off-duty conduct adequate cause for dismissal.<sup>191</sup> Public opinion, however, should not be a basis for employment discrimination. In *Diaz v. Pan American World Airways, Inc.*,<sup>192</sup> a Title VII case challenging sex discrimination in hiring flight cabin attendants, the Fifth Circuit held that "it would be totally anomalous if we

183. *Id.* at 244.

184. *Id.*

185. *E.g.*, Baltimore Transit Co., 47 Lab. Arb. & Disp. Settl. 62 (1966) (Duff, Arb.) (bus driver vocal and public Ku Klux Klan leader—danger of economic boycott); Mansfield Tire & Rubber Co., 31 Lab. Arb. & Disp. Settl. 775 (1958) (Shaw, Arb.) (employee convicted of grand theft in connection with aid from local welfare commission: reinstated).

186. *E.g.*, Gas Service Co., 39 Lab. Arb. & Disp. Settl. 1025 (1962) (Granoff, Arb.) (installation and service employee who associated with persons of low moral character and had bad reputation held potentially unsafe); Chicago Pneumatic Tool Co., 38 Lab. Arb. & Disp. Settl. 891 (1961) (Duff, Arb.) (potential degeneration of cocaine addict possible industrial hazard).

187. *E.g.*, Movielab, Inc., 50 Lab. Arb. & Disp. Settl. 632 (1968) (McMahon, Arb.) (employee convicted of narcotics violations reinstated—no evidence of adverse effect on reputation); Owens-Illinois Glass Co., 38 Lab. Arb. & Disp. Settl. 1003 (1962) (Duncan, Arb.) (employee arrested for bootlegging and grand larceny. Discharge justified, since reflected adversely on company); Mansfield Tire & Rubber Co., 31 Lab. Arb. & Disp. Settl. 775 (1958) (Shaw, Arb.) (employee's conviction of grand theft in connection with aid from local welfare commission did not damage name of company).

188. *E.g.*, Owens-Illinois Glass Co., 38 Lab. Arb. & Disp. Settl. 1003 (1962) (Duncan, Arb.) (publicity of employee's arrests reflected adversely on coworkers and company); Baltimore Transit Co., 47 Lab. Arb. & Disp. Settl. 62 (1966) (Duff, Arb.) (discharge of vocal and public Ku Klux Klan leader approved in face of potential wildcat strike and economic boycott by patrons).

189. *E.g.*, Memphis Publishing Co., 48 Lab. Arb. & Disp. Settl. 931 (1967) (Cantor, Arb.)

190. *Id.* at 933.

191. *E.g.*, Baltimore Transit Co., 47 Lab. Arb. & Disp. Settl. 62 (1966) (Duff, Arb.) (bus driver vocal and public Ku Klux Klan leader); Menzie Dairy Co., 45 Lab. Arb. & Disp. Settl. 283 (1965) (Mullin, Arb.) (driver-salesman charged with pandering and obscene exhibition); Gas Service Co., 39 Lab. Arb. & Disp. Settl. 1025 (1962) (Granoff, Arb.) (installation and service employee who associated with persons of low moral character and had bad reputation); Consolidated Badger Coop., 36 Lab. Arb. & Disp. Settl. 965 (1961) (Mueller, Arb.) (driver-salesman convicted of fornication).

192. 442 F.2d 385 (5th Cir. 1971).

were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid."<sup>193</sup> In one case at least, though the arbitrator did find that "reinstating [a driver-salesman convicted of fornication] . . . would definitely have an adverse effect upon the consuming public," he recommended that the employer give serious consideration to recalling the employee for an inside job.<sup>194</sup> A complainant certainly could not count on such a recommendation, nor is it binding on the employer. This action, however, does evidence a genuine attempt fairly to resolve a dispute, and indicates sympathy with the position of the employee. Both of these attributes are characteristic advantages that arbitration offers to the employee in the midst of a dispute with management.

Clauses in union contracts requiring just cause for dismissal may, therefore, protect gay employees from dismissal on the grounds of their homosexuality. Employers would be forced to show that the employee's homosexuality had a direct relationship to the employment to justify a dismissal based on that homosexuality. Homosexual acts between consenting adults in private can never be directly related to the employment relationship if the employee-actor has no contact with the public, unless there is widespread publicity.<sup>195</sup> Even under contracts with community morality provisions, gay employees in states that do not prohibit private consensual homosexual acts between adults should be protected against dismissal for these acts.

Since sexual preference usually is not related to employment, and therefore does not constitute just cause for dismissal, an employer may be denied even the opportunity to receive responses from the employee concerning his/her sexual preference. At least one arbitrator has held; "[T]o attempt to force [an employee], through a disciplinary suspension, to reveal facts about her family and her private life which did not concern the Company, her job, or her performance of it, was not proper and will not be upheld."<sup>196</sup>

#### 4. *Dismissal on the Basis of Political Acts is Tortious*

A thought-provoking theory concerning employee dismissal cases would modify the traditional "employment at will" rule<sup>197</sup> with the recognition of a new common-law tort that would supply a remedy for

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193. *Id.* at 389.

194. Consolidated Badger Coop., 36 Lab. Arb. & Disp. Settl. 965, 968 (1961) (Mueller, Arb.).

195. If a discharge is based on publicity of an employee's statements, first amendment free speech issues may arise. *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (gay teacher's transfer approved, though public statements held to be constitutionally protected).

196. South Cent. Bell Tel. Co., 59 Lab. Arb. & Disp. Settl. 134, 140 (1972) (Seward, Arb.).

197. One example of the application of the common law rule is a case holding that an employer may dismiss employees at will "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. Western & A. R. R.*, 81 Tenn. 507, 519-20 (1884).

employees who are discharged because of their political beliefs.<sup>198</sup> The remedy is most clearly appropriate when the employer did not act to advance normal business interests, when a large business is involved, and when the employee did not hold a position in which personal political feelings might be significant.<sup>199</sup> A general abusive-discharge doctrine has been established in at least nine jurisdictions, under which employers have been found liable for dismissing employees for reasons offensive to public policy.<sup>200</sup> A common-law tort principle that recognizes a cause of action in any intentional infliction of harm without justification is the source of this remedy.<sup>201</sup> Common-law tradition, which would adapt law to produce common sense justice, supports recognition of such an exception to the absolute "employment at will" rule.<sup>202</sup>

This theory provides a just remedy for advocates of the rights of gay persons who are discharged for no reason except that advocacy. *McConnell v. Anderson* exemplifies such a situation in which a tort remedy would be appropriate.<sup>203</sup> McConnell attempted to marry another man at the same time that he was waiting for approval of his appointment to a university librarian position. The Board of Regents rejected McConnell's appointment after the attempted marriage drew extensive publicity. The district court held that the denial of the appointment was unjustified,<sup>204</sup> but the Eighth Circuit reversed on appeal.<sup>205</sup> The appellate court said that McConnell was demanding the "right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of the socially repugnant concept upon his employer."<sup>206</sup> The court distinguished the case in which a person only wanted to "clandestinely . . . pursue homosexual conduct."<sup>207</sup> McConnell's homosexuality was not the basis for denial of the job—it was his political advocacy of the right of gay people to marry that cost him his job. A gay person's decision to be open about his/her

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198. Krinsky, *Chin v. American Telephone & Telegraph: Appellate Brief against Firing for Political Action*, 36 THE NATIONAL LAWYERS GUILD PRACTITIONER 80 (1979).

199. *Id.* at 85.

200. *Id.* at 86; *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Dist. Ct. App. 1959); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (Ill. App. Ct. 1977); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

201. *Id.* at 89.

202. *Id.* at 90-91.

203. 451 F.2d 193 (8th Cir. 1971).

204. 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971).

205. 451 F.2d 193 (8th Cir. 1971).

206. *Id.* at 196 (emphasis in original).

207. *Id.*

homosexuality is often a political act considered to be essential to the achievement of recognition of the rights of gay people.<sup>208</sup>

It is fairly clear that political activity is encouraged by society. The legitimate nature of gay rights advocacy as a political activity has been recognized for purposes of grants of tax-exempt status to corporations,<sup>209</sup> and grants of university privileges to gay rights groups.<sup>210</sup> An absolute "employment at will" rule is not consistent with an economic reality wherein an employee cannot as easily find another job as an employer can find another worker.<sup>211</sup> In *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,<sup>212</sup> the California Supreme Court recognized advocacy of gay rights as a political activity that would be protected from interference by the California Labor Code. Employers should not be allowed to punish gay activists for their efforts to achieve protection for their civil rights—society encourages such political activity and, thus, should protect the rights of those who participate in it.

### 5. State and Local Law

No state statutes or regulations exist that specifically protect the rights of gay people in private employment. There are a number of municipal and county ordinances, however, that prohibit discrimination in private employment based on sexual preference.<sup>213</sup> These ordinances have been in existence only a short time,<sup>214</sup> so it is difficult to determine their effect. Widespread knowledge of the existence of these laws is essential to changes in employment practices and achievement of gay employees' remedies.

208. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 486-89, 595 P.2d 592, 609-11, 156 Cal. Rptr. 14, 31-33 (1979).

209. "The Internal Revenue Service has reversed its policy of denying charitable tax exempt status, under section 501(c)(3) of the tax code, to otherwise eligible organizations that take the position that homosexuality is an acceptable, alternative life style, rather than a 'sickness, disturbance, or diseased pathology.'" *It's TIME*, newsletter of NGTF, Oct. 1977, at 1. The Internal Revenue Service has not issued a formal regulation. Apparently, each request is handled in the national office on a case-by-case basis. Rivera, *supra* note 1, at 912-13.

210. *E.g.*, *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978) (university could not refuse to recognize homosexual student organization); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) (court ordered university to recognize homosexual student organization as registered student organization).

211. Krinsky, *supra* note 197, at 88.

212. 24 Cal. 3d 458, 486-89, 595 P.2d 592, 609-11, 156 Cal. Rptr. 14, 31-33 (1979).

213. Anchorage, Alaska, Ordinance A077-75 (Jan. 20, 1976); ANN ARBOR, MICH., CODE ch. 112, §§ 9:151-9:155 (1972); DETROIT, MICH., CODE ch. 10, §§ 7-1004-7-1005 (1976); EAST LANSING, MICH., CODE ch. 4 § 1.127 (1973); MADISON, WIS., CODE § 323(7) (a) (1976); MINNEAPOLIS, MINN., CODE ch. 945 (1975); PALO ALTO, CAL., ADMIN. CODE § 2.22.050 (1969); Seattle, Wash., Ordinance 102,562 (Sept. 18, 1973); Washington, D.C., Human Rights Law (Nov. 16, 1973). Alfred, N.Y.; Austin, Tex.; Berkeley, Cal.; Cleveland Heights, Ohio; Marshall, Minn.; Portland, Ore.; San Jose, Cal.; Tucson, Ariz.; Yellow Springs, Ohio. Reported by *It's TIME*, the newsletter of NGTF, March, 1977. Santa Cruz County, Cal.; Latah County, Idaho; Howard County, Md.; Hennepin County, Minn. Reported by *It's TIME*, March, 1977. San Francisco, Cal., see NGTF Action Report 3 (May 1978); Aspen, Colo., see *The Advocate*, Jan. 25, 1977, at 8; Champaign, Ill., see *The Advocate*, Sept. 9, 1977, at 8; Iowa City, Iowa, see *The Advocate*, Feb. 8, 1978, at 11.

214. Almost all have been in existence significantly less than ten years. Rivera, *supra* note 1, at 810.



Even if a gay employee is not protected by a statute or ordinance explicitly prohibiting discrimination against gay people, that employee may have remedies for discrimination based on other state law. The most encouraging recent case concerning the rights of the privately employed gay person is a state case, *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,<sup>215</sup> in which the California Supreme Court held that a state-protected "public utility bears a [state] constitutional obligation to avoid arbitrary employment discrimination," based on the equal protection clause of the California Constitution.<sup>216</sup> The court also held that the California "Public Utilities Code bars a public utility from arbitrarily discriminating in its employment practices."<sup>217</sup> A cause of action may be stated under either of these two prohibitions by alleging arbitrary discrimination against gay persons.<sup>218</sup> The court additionally found that discrimination against openly gay persons or against gay rights advocates is a violation of the California Labor Code provisions<sup>219</sup> prohibiting employers' interference with employees' political activities.<sup>220</sup> A cause of action may be stated under the Labor Code by alleging particular discrimination against "persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations."<sup>221</sup> The California Supreme Court said: "[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."<sup>222</sup> The court emphasized the political importance of openly acknowledging one's homosexuality and associating with other gay people to work for equal rights.<sup>223</sup>

The court also indicated that, in California, any organization that has formed a monopoly of the job opportunities in a particular field may not arbitrarily exclude individuals.<sup>224</sup> This conclusion was based on common-

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215. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

216. *Id.* at 467-75, 595 P.2d at 597-602, 156 Cal. Rptr. at 19-24. CAL. CONST. art. 1, § 7(a) provides, in pertinent part: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . . ."

217. 24 Cal. 3d at 475-86, 595 P.2d at 602-09, 156 Cal. Rptr. at 25-31. CAL. PUBLIC UTILITIES CODE § 453(a)(1975) provides: "No public utility shall as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

218. *Id.* at 475, 486, 595 P.2d at 602, 609, 156 Cal. Rptr. at 24, 31.

219. CAL. LABOR CODE § 1101 (West 1971) provides: "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics. . . (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." CAL. LABOR CODE § 1102 (West 1971) provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

220. 24 Cal. 3d at 486-89, 595 P.2d at 609-11, 156 Cal. Rptr. at 31-33.

221. *Id.* at 488, 595 P. 2d at 611, 156 Cal. Rptr. at 33.

222. *Id.* at 487-88, 595 P.2d at 610, 156 Cal. Rptr. at 32.

223. *Id.* at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32-33.

224. *Id.* at 482-83, 595 P.2d at 606-07, 156 Cal. Rptr. at 29.

law principles recognizing monopolistic organizations as holding a "quasi-public position" and having corresponding obligations.<sup>225</sup> Recognized monopolies include labor unions, professional and business associations, and public and private hospitals.<sup>226</sup> Though these particular prohibitions apply only in California, *Gay Law Students* illustrates the potential usefulness of examining all state protections of civil rights—especially state labor codes, statutes controlling regulated industries, and any fair employment statutes—to determine their applicability to the rights of gay persons.

#### 6. *Employers' Nondiscrimination Policies*

The National Gay Task Force (NGTF)<sup>227</sup> has solicited policy statements on the employment of gay people from many employers in the United States. A great number of these employers have responded by enunciating nondiscrimination policies with respect to hiring and promotion.<sup>228</sup> These nondiscriminating employers include American Telephone and Telegraph (ATT), International Business Machines (IBM), Citibank, American Broadcasting Corporation (ABC), Columbia Broadcasting System (CBS), National Broadcasting Corporation (NBC), Bank of America, Procter & Gamble, Avon Products, and Eastern Airlines.<sup>229</sup> These employers are to be commended for their refusal to tolerate arbitrary discrimination against gay people. As a result of their employment policies, these employers will benefit through improved emotional health of gay employees and an expansion of their applicant pool.<sup>230</sup>

A gay employee who does suffer discrimination, despite these assurances of nondiscrimination, will probably seek relief through internal grievance processes. If no internal remedy is provided, the employee could pursue a contractual third-party beneficiary remedy based on the existence of a contract between NGTF and the employer. NGTF's solicitation was an offer that the employer accepted by issuing its nondiscrimination policy statement. In consideration for the affirmance of the employer's policy, NGTF provides employees and potential employees with knowledge of that policy. This could increase the productivity of current employees and increase the pool of qualified applicants for future job openings. If such a contract exists, the gay employee who is discriminated against may

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225. *Id.* at 481, 595 P.2d at 606, 156 Cal. Rptr. at 28.

226. *Id.* at 483, 595 P.2d at 606-07, 156 Cal. Rptr. at 29.

227. NGTF is a national gay civil rights organization.

228. NGTF Action Report 4 (April 1978).

229. Friedman, *supra* note 30, at 572 n. 239; A LEGISLATIVE GUIDE TO GAY RIGHTS 63-64 (1976) (published by the Portland, Oregon Town Council); NGTF Action Report 4 (April 1978).

230. See text accompanying notes 236-244 *infra*.

demand injunctive or monetary relief from the employer for its breach, through assertion of third-party beneficiary rights.<sup>231</sup>

Even if no contract exists, the commitment of an employer may be enforced under a theory of promissory estoppel.<sup>232</sup> An employer reasonably should expect that its commitment to a nondiscrimination policy will be relied upon by gay people. The gay applicant may rely on the policy statement in applying for a job and passing up another job opportunity in which homosexuality would not be grounds for discrimination. The gay employee may acknowledge his/her sexual preference or become active in the gay rights movement in reliance on such a commitment. The gay employee who openly acknowledges his/her homosexuality or the gay applicant who accepts a job in reliance on a commitment to nondiscrimination has relied to his/her detriment if discrimination occurs. If there had been no reliance, the employee might have avoided the harm of discrimination by keeping his/her sexual preference hidden or never applying for or accepting a job with the discriminating employer. In the case of the employee who decides to acknowledge openly his/her homosexuality, this declaration can hardly be set aside when the employee discovers that the employer does not intend to fulfill his/her commitment. Not only the present employment, but all future employment opportunities may be limited by this action. A court could conclude that injustice could be avoided only by enforcing the promise.

## II. POLICY CONSIDERATIONS

Gay people have become a relatively visible and vocal minority only in recent years.<sup>233</sup> Many people have no idea of the effects of discrimination against gay people—on the individual or on society. Yet these considerations are of the utmost importance in deciding whether such discrimination will be tolerated. Public policy is an essential ingredient of any case presented to a judge, a jury, or an arbitrator. The legislator must be given reasons why he/she should support anti-discrimination legislation.

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231. Generally, a third person may enforce a contract if the contract was intended to benefit that third person, though that person was not a party to the contract, and provided no consideration for the promise. See RESTATEMENT (SECOND) OF CONTRACTS §§ 131, 135, 138, 139 (Tent. Drafts Nos. 1-7, 1973).

232. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965) provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

233. Riots at the Stonewall Inn bar in New York City, N.Y., in the summer of 1969 are commonly declared to be the turning point of the gay rights movement. *E.g.*, D. ALTMAN, *supra* note 128, at 117-18. Wilson & Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L. J. 1029, 1029 (1979). The incident is cited as the first time large numbers of gay people fought back in the face of their oppression. D. ALTMAN, *supra* note 128, at 117.

No one seriously suggests that discrimination against gay people is a deterrent to the existence of gay people.<sup>234</sup> If that were the case, when Hitler was burning gay people in Germany<sup>235</sup> all gay persons in the country would have "decided" to be heterosexual. The choice that is presented to a gay person is either to try to pass<sup>236</sup> as heterosexual or be openly gay. There is great mental and emotional strain involved in trying to seem to be other than what one is.<sup>237</sup> Aside from the constant strain, passing involves the ever-present danger of discovery of the truth—and the consequences of discovery are seldom pleasant.<sup>238</sup> In *Acanfora v. Board of Education*,<sup>239</sup> for example, the Eighth Circuit upheld transfer of a gay teacher to a nonteaching position on the ground that the teacher made a material omission in his teaching application by not mentioning his participation in gay activities. For obvious reasons, most closeted<sup>240</sup> gay persons live in almost constant fear of discovery. Gay persons who are open about their sexuality, however, are, at the present time, constantly at the mercy of the whims of employers.<sup>241</sup>

The present status of gay persons can affect gay people and society only in negative ways. Since closeted gay people are in such a precarious position with respect to their means of supporting themselves, they are often victims of blackmail.<sup>242</sup> Exposure to blackmail, police harassment,<sup>243</sup> and minimal scattered enforcement of laws prohibiting specific sexual activities,<sup>244</sup> create contempt for the legal system.

234. After an extensive examination of the literature on the subject of changing sexual preference, one psychiatrist concludes that reported results of psychotherapy and behavior modification, "point to a cautious optimism that persons with some heterosexual experience may develop more, but suggest that persons, especially adult male persons, with no heterosexual experience, have relatively slight prospects of change." D. WEST, *HOMOSEXUALITY RE-EXAMINED* 275 (1977). Some authorities have found that even if a person wants to change his/her sexual preference, it cannot be done using any known kind of therapy. C. TRIPP, *supra* note 131, at 236-38.

235. D. ALTMAN, *supra* note 128, at 54.

236. To "pass" is defined as: "To be accepted as something different." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 957 (1973).

237. OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK 89, 118 (1978) (stresses of being a closeted lesbian); OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 8-10 (1977) (one man's experience of closeted homosexuality).

238. E.g., loss of employment, rejection by family, social disfavor. See D. WEST, *supra* note 37, at 91.

239. 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

240. Closeted is defined as: "1. Private; concealed; confidential." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 253 (1973).

241. Even in public employment, a person who is openly gay may be accused of flaunting his/her sexual preference, and discrimination may be permitted. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

242. A. BELL & M. WEINBERG, *supra* note 1, at 190-93. The possibility of blackmail often is cited as a reason not to grant security clearances to homosexual persons. If a person is open about their sexual preference, however, the threat of blackmail is minimal. Rivera, *supra* note 1, at 829-37.

243. D. ALTMAN, *supra* note 128, at 45-47.

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[N]umerous states prohibit private, consenting homosexuality. Maryland arguably is among them. . . . [D]espite the substantial activity, no reported case reveals the enforcement of this law against private homosexuality. . . . The sweeping invasion of privacy which would necessarily accompany enforcement explains this phenomenon, raising severe questions

Clearly, society also suffers because of the status of gay persons. Gay persons who are forced to become unproductive citizens are a resource the benefit of which society has denied itself. The emotional drain closeted gay people experience—the constant fear of discovery and resultant loss of employment—certainly limits their ability to work efficiently.<sup>245</sup> Gay persons who cannot find employment must be supported by society.<sup>246</sup> Therefore, both society and the individual suffer economic losses because of the status of gay people.

There are not only economic reasons, but also moral reasons for protecting the rights of gay people in employment. The analysis of Ronald Dworkin with respect to individuals' moral rights against the state aids in understanding the relevance of morality in the courts.<sup>247</sup> His theory is that a person has moral rights against the state if for some reason the state would do an injustice to treat him/her in a certain way, though it might be in the general interest to do so.<sup>248</sup> Dworkin does not accept the theory that democratic institutions can be counted on to protect individual rights, because all of these institutions have similar interests that are hostile to the rights of minorities.<sup>249</sup> He concludes that judicial activism through principled decisions works towards the achievement of moral progress, that incorrect decisions will be eroded, and that there is danger in a failure to act.<sup>250</sup> Dworkin declares: "[L]aw is no more independent from philosophy than it is from sociology and economics."<sup>251</sup> The philosophy on which the United States is based is a philosophy of equality. Implementation of principles of equality should be a significant element of legal decisionmaking. Recognition of the right of individuals to be treated justly by the state, and implementation of principles of equality, call for protection of gay people's right to equal treatment.

Some protest that homosexuality is illegal and immoral. Homosexual acts are illegal in many states,<sup>252</sup> but homosexual status is not illegal anywhere.<sup>253</sup> Serious questions concerning the right to privacy<sup>254</sup> and

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regarding the inner morality of a law beset by internal contradictions and a lack of congruence between official action and declared rule.

*Acanfora v. Board of Educ.* 359 F. Supp. 843, 852 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

245. Kovarsky, *supra* note 163, at 529-31.

246. Since some gay persons are criminals solely because of their sexual preference, Rivera, *supra* note 1, at app. A, their chances to be productive citizens may be eliminated.

247. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

248. *Id.* at 138-39.

249. *Id.* at 142-43.

250. *Id.* at 147-48.

251. *Id.* at 149.

252. Rivera, *supra* note 1, at app. A.

253. Laws making homosexual status illegal may be held unconstitutional under the Supreme Court's holding in *Robinson v. California*, 370 U.S. 660 (1962) (statute criminalizing status of narcotics addiction held unconstitutional).

254. *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 852 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); Richards, *Sexual Autonomy and the Constitutional Right to*

freedom of association<sup>255</sup> are raised by existing criminal prohibitions. If one assumes that the criminal prohibitions are valid, it has been estimated that "95% of all males [have] engaged in some type of sexual play punishable as a crime."<sup>256</sup> Since significantly more than five percent of all males are employed, those who engage in potentially criminal sexual play must be considered employable. The legality of the consensual sexual activities in which a person participates in private is not a criterion for employment of heterosexuals and so should not be a criterion for employment of gay people. Not only is it important to gay people that their rights be protected, it is also important to society as a whole. The court in *Acanfora v. Board of Education*<sup>257</sup> addressed some of the results of society's continued oppression of gay people:

[S]ociety . . . cannot flatter itself as free from the stain of legal persecution. The *chief* harm in these laws is the perpetuation of social stigma, cramping mental development, cowering reason, and repressing human expression for fear of social disfavor.

Such are the differences in the nature of human beings that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness nor grow up to the mental, moral and aesthetic stature of which their nature is capable. . . . Preservation of the *atmosphere* of freedom in an imperfect world is furthermore essential to the advancement of mankind.<sup>258</sup>

It is essential to the healthy development of the individual and society that protection of the rights of gay people be recognized.

One court has declared that forcing an employer to hire or retain a gay employee is equivalent to forcing that employer to condone the gay lifestyle.<sup>259</sup> It has probably never occurred to most people that employers condone all off-duty conduct of their employees. Employers have been required to retain employees convicted of criminal conduct when that conduct is not directly related to the employment relationship.<sup>260</sup> If employment implied employer approval, employers could not be forced to retain these employees.

Similarly, discrimination against gay people is not justified because other employees may not want to work with gay people. It is true that many heterosexual persons do not approve of a gay person's sexual preference. A recent study, however, indicates that co-workers of gay

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*Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979). *Contra*, *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (affirming without opinion lower court holding that Virginia sodomy statute is constitutional).

255. See generally, Wilson & Shannon, *supra* note 232.

256. This Kinsey estimate was cited in Kovarsky, *supra* note 163, at 581 (footnote omitted).

257. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

258. *Id.* at 852.

259. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

260. See text accompanying note 159 *supra*.

people do not suffer from their association with gay employees.<sup>261</sup> A state agency in Oregon conducted the study and discovered that state employees who worked with gay people were twice as likely to say they would be comfortable working with a gay person as a co-worker or superior as those who had no professional association with gay persons.<sup>262</sup> A person may not be denied a supervisory role because subordinates would not respect that person based on his/her race or sex.<sup>263</sup> Discrimination against gay people cannot be distinguished by claiming that gay people have chosen their unpopular position in society. Recent studies refute theories that there is any significant amount of choice of one's sexual preference.<sup>264</sup>

### III. CONCLUSION

The best way to protect the rights of gay people in private employment is through the enactment of statutes or the issuance of executive orders that expressly prohibit discrimination against gay people in private employment. The most direct way to create this statutory protection would be to amend Title VII to include sexual preference in the list of impermissible classifications.<sup>265</sup> At the present time, many city and county statutes do exist to protect the employment rights of gay people,<sup>266</sup> but only a small number of employers throughout the United States are subject to such statutes. Like other relatively powerless minorities, gay people must seek protection through the courts until legislators will confront this controversial issue.

The legal profession should carefully consider the position of gay people in this country and note the similarities between their struggles and the struggles of black people and women for protection of their rights. The bar should support the efforts of gay people to achieve recognition of their employment rights. In addition, individual attorneys have an ethical responsibility, in any particular controversy, zealously to represent their gay clients' interests.<sup>267</sup> Courts also must recognize that this issue is in need of speedy resolution and must give all due consideration to the matters involved. The employment of a large minority of Americans,<sup>268</sup> and the American ideal of equality lie in the balance.

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261. Friedman, *supra* note 30, at 543-44.

262. *Id.*

263. *Id.* at 544-45.

264. C. TRIPP, *supra* note 131, at 236-38.

265. For a list of some bills that have been introduced in Congress proposing such an amendment, see note 29 *supra*.

266. See note 212 *supra*.

267. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1, DR 7-101 (1977).

268. The Institute for Sex Research at Indiana University now estimates that 13.95% of males and 4.25% of females have had more than incidental homosexual experience. The combined figure is 9.13% of the total population of the United States. Letter from Paul Gebhard, Director, Institute for Sex Research, Indiana University, to NGTF, March 18, 1977.

